SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1973
No. 73-1010

ROBERT MITCHELL,
Petitioner,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE SIXTH APPELLATE
JUDICIAL DISTRICT OF THE STATE OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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JURISDICTION

The Court has no jurisdiction over this cause for the reason that the petition for a writ of certiorari was filed with the Clerk on the ninety-first day in violation of 28 U.S.C. § 2101 (c) (1949) and Rule 22 (3) of this Court.

COUNTER STATEMENT OF THE CASE

Petitioner has misstated the case in one particular which should cause this Court to deny the writ of certiorari being sought. In the Question Presented on page 2 of the petition, petitioner states that at the time of his injury he was taking a coffee break. Further, on page 10

of the petition, he states that he was "emerging from the cook car provided by the respondent railroad for refreshment of railroad employees. . . . " All of this is incorrect. It is undisputed and uncontradicted in the State court records below that petitioner was not taking a coffee break. He had finished his duties for the day and had locked up his office with no intention of returning to work or to his office. He was not required to remain on the premises until his regular quitting time. In fact, he was going to leave the premises before quitting time with a friend in order to make it to a meeting in a neighboring town. While waiting for his friend to pick him up, petitioner went over to the cook car which was out of his way and where he had never been before and where he was not required or even expected to be. The cook car was provided *solely* for the employees of respondent's signal department and not for petitioner who was an employee of the completely separate transportation department. In fact, no one other than signal department employees had ever been seen going in and out of the cook car which had remained stationary at the same location for several months prior to the accident without any incident. Indeed, signal department employees provided their own food and drink at the cook car paying for the same out of their own pockets.

It is undisputed that petitioner was at the cook car, after his working hours, after his duties for respondent were done, waiting for his friend to take him to the meeting in the neighboring town. He had gone over to that car solely for his personal purposes and not, in any way, for the purposes of furthering his duties as an employee of the respondent. When his friend arrived, petitioner put down his coffee, stepped onto and fell down the stationary steps leading out of the cook car, injuring his knee.

REASONS FOR DENYING THE WRIT

The pertinent second paragraph of 45 U.S.C. § 51 (1939), Federal Employers' Liability Act, provides as follows:

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Although petitioner, in his Question Presented, states that the decisions of the courts below are in conflict with the decisions of the Supreme Court of the United States (page 2 of the petition), he cites no decisions of this Court in support of his contention.

In the case of *Reed v. Pennsylvania Railroad Company*, 351 U.S. 502 (1955), this Court stated on page 507 of its opinion as follows:

> . . . those duties which "in any way directly or closely and substantially affect" interstate commerce in the railroad industry must necessarily be marked out through the process of a case-by-case adjudication. . . .

The cases containing the issues raised by petitioner hold that if an employee is engaging in an activity undertaken for a private purpose and having no causal relationship with his employment, he is not covered by the Federal Employers' Liability Act. See the leading case of *Atchison, T. & S. F. R. Co. v. Wottle*, 193 F.2d 628 (10th Cir.

1952), *dism'd*, 344 U.S. 850 (1952). See also, the factually similar case of *Wallace v. St. Louis-San Francisco Railway Company*, 120 So.2d 131 (Sup. Ct. Miss. 1960), *cert. den.*, 364 U.S. 862 (1961), where, on page 135 of the opinion, the court quotes, with approval, Judge Learned Hand's opinion in the case of *Mostyn v. Delaware, L. & W. R. Co.*, 160 F.2d 15, 17 (2d Cir. 1947), which provides in part as follows:

> ". . . We hold as we did in Young v. New York, N. H. & H. R. Co., supra, 74 F.2d 251 (2nd Cir. 1934), that any activity undertaken by an employee for a private purpose is certainly not within his employment". . . .

Although petitioner cites the foregoing *Wallace* case on page 9 of his petition as being in his favor, the *Wallace* court held, as a matter of law, that the plaintiff therein was not furthering or affecting interstate commerce within the meaning of the Federal Employers' Liability Act.

All of petitioner's cases are inapposite for two reasons which are suggested on pages 134-136 of the opinion in the said *Wallace* case, *supra*: (1) they are either interlude cases involving employees who are temporarily absenting themselves from their employment during the lunch hour or breaks, etc., as anticipated by the employer which expects them to return to work; or (2) such cases involve employees who, while going to or from work, are injured at a time and place (whether on or off the employment premises) where the employer expects or anticipates that they will be. Thus, in *Mostyn v. Delaware, L. & W. Railway Company*, 160 F.2d 15 (2d Cir. 1947), cited on page 7 of the petition, the employee was injured at a time and place where his railroad employer expected him to be. Similarly, in *Baltimore & O. R. Co. v. Kast*, 299

F. 419 (6th Cir. 1924), also cited on page 7 of the petition, the employee was injured while taking a break for lunch but intending to return to work immediately afterward as his employer anticipated.

In the case before this Court, it is undisputed that petitioner was injured after he had completed his duties and at a place where he was not required or even expected to be. At the time of his injury, he was satisfying his own personal desires and therefore was not furthering or affecting interstate commerce within the meaning of the Federal Employers' Liability Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 2101 (1949)

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a perid not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been

rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

45 U.S.C. § 51 (1939)

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the neg-

ligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.